



Ofcom Consultation “Revising the penalty guidelines”

1. This is the response of Sky UK Limited (“Sky”) to Ofcom’s consultation “Revising the penalty guidelines” (the “Consultation”).¹
2. Ofcom is proposing to increase the deterrent effect of its enforcement decisions by signalling that it intends to increase the level of fines (where appropriate and proportionate) for breaches of regulatory obligations in order to help reduce the continuing levels of complaints to Ofcom and contraventions of regulatory requirements.
3. Sky considers that Ofcom’s current approach already carries a sufficient deterrent effect and promotes a strong culture of compliance within organisations. Sky takes compliance very seriously and questions whether there is, as Ofcom states in the Consultation, a “*need to create a stronger deterrent effect*”². We make the following additional points below³:
 - The level of complaints is low and does not justify further intervention by Ofcom;
 - The current level of fines already create a strong and sufficient deterrent effect;
 - Should the proposed draft penalty guidelines⁴ (the “Draft Guidelines”) be adopted:
 - Ofcom should provide indicative levels of fines to promote legal certainty;
 - clarification as to the level of importance of the relevant factors to be considered by Ofcom in assessing the level of a fine is required; and
 - the Draft Guidelines should only apply to future investigations.

The current level of complaints is low

4. Ofcom has stated that despite a general decrease in the level of complaints since 2011, the decrease has slowed and is a justification for revising its guidance.
5. Sky notes that since Q4 2010 there has generally been a downward trend in the number of complaints received⁵ and whilst the decrease in the number of complaints has slowed somewhat since 2013, the overall level is still very low. Overall consumer levels of satisfaction with communication services is around 90%⁶ and the number of consumer

¹ http://stakeholders.ofcom.org.uk/binaries/consultations/penalty-guidelines-15/summary/Penalty_Guidelines_2015.pdf

² Paragraph 1.2, the Consultation.

³ Please note that in line with Ofcom’s approach in the Consultation, Sky’s response focuses primarily on telecoms regulation.

⁴ Annex 4, Proposed draft penalty guidelines in the Consultation.

⁵ Figure 1 of Ofcom’s “Telecoms and Pay TV Complaints Q2 (April to June 2015)”

(<http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/complaints/Q2-2015.pdf>).

⁶ According to Paragraph 2.1 of Ofcom’s “Telecoms and Pay TV Complaints Q2 (April to June 2015).”

complaints to Ofcom against telecoms and Pay TV providers for Q2 2015 was less than 0.1 per 1,000 customers.⁷ This is extremely low and Sky does not consider that the level of consumer complaints is a sufficient justification to support the changes proposed by Ofcom.

6. Ofcom also has not provided any evidence which suggests that the recent slower rate of decrease in consumer complaints is due to an insufficient level of deterrence. There are factors other than the level of penalties which could impact the number of consumer complaints Ofcom receives. For example, the efficacy of Ofcom's consumer awareness campaigns and strategy is likely to influence the level of complaints. Increasing consumer awareness of both Ofcom's role and recent enforcement action against providers may result in increased levels of complaints in some areas. As Ofcom has noted "*Ofcom may see spikes in call volumes from customers of certain providers when we publicise certain types of enforcement action*".⁸

Current levels of fines provide a strong and sufficient deterrent effect

7. Sky considers the current levels of fines already provide a strong and sufficient deterrent effect and engender a culture of compliance in regulated bodies. We note that TalkTalk received a significant fine of over £3 million for breach of the General Conditions.⁹ This level of fine is more than sufficient to create a deterrent effect and incentivise management to make a change to its compliance practice.
8. It should be noted that in addition to any financial penalty imposed by Ofcom, the negative publicity accompanying enforcement action can cause serious reputational damage. Reputational damage is a significant concern at all levels within an organisation and this alone will, in many cases, be sufficient to discourage non-compliance and to foster a culture of compliance irrespective of the level of fine.
9. Sky operates in a dynamic and competitive environment and must continue to invest and innovate in order to keep customers happy. We make huge efforts "behind the scenes" to keep our customers satisfied and invest heavily in customer service and into keeping customer satisfaction levels high. One of Sky's key performance indicators is its customer "Net Promoter Score" which measures how likely Sky customers are to recommend Sky to others. Customer satisfaction and a culture of compliance is critical to our success and hardwired into our operations, not because of the risk of financial penalties but because we want to deliver the best service to our customers.

Ofcom should set out indicative penalties to promote legal certainty

10. Ofcom has indicated in the Consultation that, depending on the facts and context of each case, it may depart from precedent and, moreover, that Ofcom may set higher penalties under the Draft Guidelines¹⁰.

⁷ This is an average of complaints relating to broadband, fixed line, mobile pay monthly, mobile PAYG and Pay TV. See Figure 1 of Ofcom's "Telecoms and Pay TV Complaints Q2 (April to June 2015)".

⁸ Paragraph 1.4 "Telecoms and Pay TV Complaints Q2 (April to June 2015)".

⁹ <http://media.ofcom.org.uk/news/2011/talktalk-and-tiscali-uk-fined-3-million-for-breaching-consumer-rules/>

¹⁰ Paragraphs 7 and 8, the Draft Guidelines.

11. Notwithstanding Sky's view that no change to the existing guidelines is required, should Ofcom decide to adopt the Draft Guidelines Sky considers that it would be important for Ofcom to publish indicative levels of penalties for various regulatory breaches.¹¹ This would provide greater transparency and legal certainty to communications provider in the absence of being able to rely on precedents set in previous enforcement action. It would also assist Ofcom in applying a consistent approach to setting penalties.
12. We also note that the European Commission's Guidelines on the method of setting fines for competition law infringements¹² sets out clearly the process for determining the amount of the fine and gives clear guidance as to how the Commission will arrive at the eventual amount of the fine. It would be helpful if Ofcom could provide some similar guidance.

Clarification of the importance of the relevant factors to be considered by Ofcom in assessing the level of a fine

13. In the Draft Guidelines¹³ Ofcom provides examples of potentially relevant factors that it may take into account when determining the level of penalty and also proposes to amend the order of these factors. Sky seeks clarification from Ofcom as to whether the re-ordering of certain factors impacts the importance of each factor and whether the individual factors will carry a different weight in Ofcom's assessment of the level of the fine. If this is the case, clear guidance should be given by Ofcom as to the weighting of the relevant factors.

The new guidelines should be applicable to future investigations only

14. Ofcom also states that *"the intention of these proposed changes is to make clear that Ofcom will not necessarily be constrained by the amounts of penalties imposed in previous cases, from the point at which revised penalty guidelines are published."*¹⁴
15. Should Ofcom decide to adopt the Draft Guidelines, in the interests of transparency and legal certainty, the Draft Guidelines should specify that they will only apply to enforcement action resulting from Ofcom investigations initiated after the date that the new guidelines come into effect and will not extend to enforcement action arising from existing investigations.

Sky

24 September 2015

¹¹ Ofcom also needs to act appropriately and proportionately when setting any such indicative penalties.

¹² "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/ 2003 ([http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006XC0901\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006XC0901(01))).

¹³ Paragraph 12.

¹⁴ Paragraph 1.23, the Consultation.